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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1001

NATIONAL STARCH PRODUCTS, INC.,
Petitioner,

vs.

THE UNITED STATES (INDEX INDUSTRIAL CORP., Party In Interest),
Respondent.

REPLY TO PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE BLAKELY-HARREN PRINTING COMPANY, CHICAGO

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The Petition For Writ of Certiorari was filed on April 9, 1963. On April 26, 1963, the party in interest, Index Industrial Corp., filed a brief in opposition to the petition. While the other respondent, The United States of America, has not yet filed a brief, petitioner desires to reply to certain points raised in the brief which has been filed.

ARGUMENT.

The questions presented are stated on page 2 of the petition.[1]

1. THE DUAL BURDEN OF PROOF.

The party in interest asserts that certiorari should not be granted because the "dual burden of proof" is "clearly covered" by the applicable statute and "well-settled by prior decisions of this Court" (Br. p. 3). However, there is no such express provision in the statute[2] nor does party in interest cite any such prior decisions of this Court. Its contentions are clearly erroneous as shown by its own arguments.

By way of argument, the party in interest asserts that the dual burden is based upon a "necessary *inference*" in the statute. The party in interest lifts certain statutory passages out of context as support for this "necessary inference" (Br. pp. 5-6). The fact that the statute[3] provides that an American producer "*may*" protest *both* the

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1. "QUESTIONS PRESENTED

"1. Whether an American producer in a protest suit under Section 516(b) of the Tariff Act of 1930, 19 U. S. C. Sec. 1516(b), has the dual burden not only of proving that the collector's classification of the merchandise in question is erroneous but also of establishing the correct classification under that Act.

"2. Whether an American producer, assuming that it does have a dual burden of proof in a protest suit under Section 516 (b) of the Tariff Act of 1930, is entitled to rely on the presumption of correctness of an applicable general classification under which the merchandise in question is classified by the Customs Bureau if an *eo nomine* exception for the particular merchandise in question is shown to be erroneous."

2. 19 U. S. C. §1516(b) (reprinted in Pet. App. A, p. iv).

3. Ibid.

classification and rate or rates of duty does not support any such inference because the statute also provides that a protestant may "protest the classification of, *or* rate of duty imposed upon, such merchandise"[4] (Italics supplied). Finally, the party in interest overlooks the language of the statute which contemplates that a protest may be sustained "in whole or in part."[5] These points are discussed more fully on pages 10 and 11 of the petition and refutes the "necessary inference" contended for by the party in interest.

The party in interest also seeks to inject a statutory requirement that an American producer must show injury (Br. p. 4). Again, the statute[6] contains no such requirement. As petitioner points out (Pet. p. 11) the effect of an American producer's protest is entirely prospective. It is more in the nature of a declaratory judgment action than a suit to redress injury.

The statutes[7] authorizing protests by importers and American producers are different both in purpose and effect as discussed more fully in the Petition (pp. 9-10). Accordingly, the cases cited by the party in interest (Br. pp. 7-8), which involve only importer's protests, are not applicable to this case.

Nevertheless, the propriety of granting certiorari is made even clearer by the party in interest's brief. The "dual burden of proof" is a judicial rule which this Court adopted as necessary to the proper administration of protest suits brought by importers.[8] This Court has never

4. 19 U. S. C. § 1516(b) (Reprinted in Pet. App. A. p. iv).

5. Ibid.

6. Ibid.

7. 19 U. S. C. §§1514, 1515 & 1516(b) (reprinted in Pet. App. A. pp. ii-vi).

8. *Arthur* v. *Unkart*, 96 U. S. 118 (1877).

reviewed the separate and distinct statute[9] which authorizes an American producer's protest and the question of whether such a judicial rule should be adopted in such suits is at least as significant to the administration of the Customs laws as it was in connection with suits brought by importers.

2. WAS THE COLLECTOR'S CLASSIFICATION UNDER PARAGRAPH 1539(b) PRESUMPTIVELY CORRECT?

The party in interest has missed the point of the second question presented in the petition. This question does not involve a "largely factual inquiry" (Br. p. 10): rather, it raises the basic legal question, applicable to all protest suits, of whether a protestant can rely on the presumption of correctness which attaches to the collector's classification of merchandise as would seem to be required by the decision of this Court in *Arthur* v. *Unkart*, 96 U. S. 118 (1877) and by the statute (19 U. S. C. Sec. 1502; Pet. App. A, p. i).

The party in interest's statement that it had no standing, in the Customs Court, to challenge the collector's general classification of particle board under paragraph 1539(b) (19 U. S. C. Sec. 1001) (Br. p. 9, n. 12) is wholly without merit. That classification was indisputably established in the case and the statute clearly gives the party in interest

> "* * * the right to appear and to be heard as a party in interest before the United States Customs Court * * *"[10]

Finally, the party in interest's brief (Br. p. 10) erroneously states that this question involves the construction of "an obscure section of the Tariff Act of 1930" (par. 1539 (b) *supra*) which has "already been superseded" by the

9. 19 U. S. C. §1516(b).

10. 19 U. S. C. §1516 (c).

Tariff Classification Act of 1962[11] and that the question is therefore not of public importance. The construction of par. 1539(b) is not an issue before this Court. This question applies to any protest suit (either by an importer or an American producer) and will continue to be one of broad significance when the new Tariff Schedules are made effective under the Tariff Classification Act of 1962.

3. THE TARIFF CLASSIFICATION ACT OF 1962.

The possible effect of a decision of this Court, in this case, under the Tariff Classification Act of 1962 is real and substantial. Contrary to the suggestion of the party in interest (Br. p. 10) reversal of the decision of the Court of Customs and Patent Appeals would require a change in the proposed new rate of duty on particle board under Sec. 202 of that Act.[12]

The new Tariff Schedules may go into effect within the

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11. P. L. 87-456, 76 Stat. 72.

12. "TARIFF CLASSIFICATION ACT OF 1962."

* * * * *

"PUBLIC LAW 87-456; 76 STAT. 72."

* * * * *

"TITLE II—ADMINISTRATIVE AND SAVING PROVISIONS."

* * * * *

"Sec. 202. (a) This Act shall not divest the courts of their jurisdiction over a protest filed * * * by an American manufacturer, producer, or wholesaler under section 516(b) of such Act * * * before the effective date of the Tariff Schedules of the United States."

* * * * *

"Sec. 202. (c) * * * If such a protest is sustained in whole or in part by a final judicial decision, * * * the Commission shall report to the President such changes in the Tariff Schedules of the United States as the Commission decides are necessary to conform them to the fullest practicable extent to the substance of such final decision. The President shall, as soon as practicable, proclaim such changes. * * *"

next few months, and it would be a practical impossibility to file a new protest within that time because of the time consumed by the preliminary steps required under the statute (19 U. S. C. §1516(b)). Thus, if the decision of the court below is in fact erroneous and contrary both to the decision of this Court and the statute (19 U. S. C. §1502), the error may well be perpetuated in the new Tariff Schedules, unless certiorari is granted and the error corrected.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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